United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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Date: July 22, 1997

Case No. 95 INA 491

In the Matter of:

MIAMI TAE KWON DO ACADEMY, INC.,
Employer

on behalf of

MARTIN KOLLAR,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Martin Kollar (Alien) by Miami Tae Kwon Do Academy, Inc., (Employer), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Atlanta, Georgia, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On August 23, 1994, the Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Instructor, Martial Arts. Minimum requirements for the position were a High School education and two years of experience in the job offered. The duties of the position were described as follows:

> Teaches individuals in various age groups in the preliminary and advanced techniques of martial arts. Explains and demonstrates principles, techniques, and methods of regulating movement of body, hands, and feet to achieve proficiency in kicking, stretching, fighting, punching, self-defense, free sparing, meditation, and all other areas of martial arts. Explains and enforces safety rules and regulations. Organizes and conducts competition and tournaments. Explains method of keeping score.

AF 42-43.

Notice of Findings. On March 29, 1995, the CO's Notice of Findings (NOF) advised Employer that certification would be denied, subject to rebuttal. The proposed denial was based on the CO's finding that the were two U. S. workers had applied and were qualified for the job offered and that the Employer failed to provide lawful, job-related reasons for not hiring those U.S. workers.

(1) The Employer had rejected applicant Velez because "he does not have enough teaching experience to competently perform the duties of the position as advertised". The CO observed, however, that "Mr. Velez' resume indicates that from 1989-1994 he trained under UFTKD, but also taught lower ranks preliminary and advanced techniques". The CO also noted the Employer "did not indicate whether Mr. Velez was interviewed and whether this teaching experience was the equivalent of two years". (2) In discussing the unlawful rejection of applicant Adrian, the CO said :

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

> Mr. Adrian was not hired by the employer because "applicant has no experience in the type of martial arts required for the position. He is unable to qualify for the position as advertised". Mr. Adrian's resume indicates that he has over two years experience as an instructor of karate-dodo. It appears that the employer has inferred that Mr. Adrian is not qualified because he has instructed karate and not Tae Kwon Do, however, the CO would like to point out that the alien's experience consists of two years, or just under two years, as a Martial Arts Instructor in the District Military Administration in Nitra, Czechoslovakia twelve years ago. The duties the alien performed are indicated as "training personnel in the art of Karate". Thus, it appears that the employer is requiring more from U.S. workers than from the alien.

AF 28-32. Employer was instructed to document that these U.S. workers were rejected for lawful, job-related reasons.

Rebuttal. In responding to the NOF, the Employer provided an affidavit and accompanying documentation that discussed in detail the meaning of Tae Kwon Do and explained the difference between this and other martial arts sports. Employer said that, because the CO was not familiar with the techniques of various martial arts, he was mistaken in his opinion that the two U.S. applicants identified were qualified for the position. Employer reiterated its position that these U.S. workers were unqualified. AF 06-27.

Final Determination. On May 8, 1995, the CO's Final Determination denied certification on grounds that the Employer had failed to prove that the U.S. workers referred were rejected for lawful, job-related reasons. The CO noted that the NOF had indicated that the Employer rejected Mr. Adrian because he had instructed Karate and not Tae Kwon Do. As the Alien had never instructed Tae Kwon Do, either, the Employer's rejection of this U. S. worker was for reasons that were neither lawful nor job-related. This finding was confirmed by the rebuttal, which indicated that the Alien was an instructor in Martial Arts (Karate) and not in Tae Kwon Do. Based on these findings, the CO concluded that the employer failed to prove that there are no qualified and available U. S. workers. AF 04-05).

Appeal. Employer requested administrative-judicial review of the denial by letter dated June 12, 1995. AF 01-03.

Discussion

If the employer rejects U. S. workers who have applied for the position for which an alien's labor certification is being sought, 20 CFR § 656.21(b)(6) requires an employer seeking

certification to show that those U. S. applicants were rejected solely for lawful job-related reasons. 20 CFR § 656.24(b)(2)(ii) requires the CO to consider a U. S. worker able and qualified for the job, if the U. S. worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as it customarily is performed by other U. S. workers similarly employed.

Employer rejected Mr. Adrian because his resume indicated that he had instructed Karate and not Tae Kwon Do. As the CO noted, the Alien also had instructed Karate and never instructed Tae Kwon Do. It is well-established that where the alien does not meet the employer's stated job requirement, § 656.21(b)(6) requires that certification be denied. **Studio Marble, Inc.**, 93 INA 313 (Aug. 25, 1994).[3] An employer may not require more experience of U.S. workers than the alien possesses. **Western Overseas Trade and Development Corp.**, 87 INA 640 (Jan. 27, 1988). As the Alien does not meet the Employer's minimum requirement, the Employer may not lawfully reject a qualified U. S. worker on grounds that he lacks a desired skill that the Alien also lacks.[4]

Accordingly, we conclude that labor certification was properly denied and enter the order that follows.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

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[3]Also see **Marston & Marston, Inc.,** 90 INA 373 (Jan. 7, 1992); **Special Foods,** 90 INA 379 (Jan. 6, 1992); **Chabad of the Valley**, 90 INA 314 (Oct. 29, 1991).

[4]The Employer must establish under 20 CFR § 656.21(b)(5) that its requirements for the position, as described, represent the Employer's actual minimum requirements for the job. Although the CO did not base the rejection of certification on this reason, this Employer's apparent acceptance of the Alien as qualified for the job at issue strongly suggests that the ability to teach Tae Kwan Do was not its actual minimum requirement for the position.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 491

MIAMI TAE KWON DO ACADEMY, INC., Employer
MARTIN KOLLAR, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: July 9, 1997